No. 83-888

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FELIX S. JACOB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

THE SEARCH WARRANT INVOLVED WAS IMPROPERLY GENERAL IN VIOLATION OF THE FOURTH AMENDMENT.

The Government contends, "The search warrant clearly did not authorize a general search." (Opp. Br., p. 7) In *United States v. Burch*, 432 F. Supp. 961, aff'd 577 F.2d 729 (3rd Cir. 1978), a warrant was struck down for the

impermissibly general language: ". . . and other unknown articles." The Jacob warrant authorized search for "evidence of violation of federal criminal law, including, but not limited to, mail fraud in violation of 18 USC § 1341." The above quoted language specifies only one crime alleged to be involved, but authorizes search for violation of *any* federal crime. Thus the breadth of the search was left wholely to the discretion of the officers executing the warrant, an outcome which squarely conflicts with *Burch*. This was the opinion of Judge Miller, who originally suppressed all of the evidence.

II.

THE *JACOB* DECISION IN THE FOURTH CIRCUIT IS IN CONFLICT WITH THE RECENT DECISIONS IN THE FIRST, THIRD, FIFTH AND NINTH CIRCUITS (*Riggs, Christine, Cook,* and *Cardwell*).

The Government correctly states that *United States v. Apker* 705 F.2d 293 (8th Cir. 1983) was reversed by the Eighth Circuit Court of Appeals en banc. *United States v. Fitzgerald* No. 82-1242 (Dec. 7, 1983), cert. denied, No. 83-600 (Jan. 23, 1984), petition for cert. pending, No. 83-1285. However, the law of the several circuits remains unsettled as to the legality of admitting evidence found in plain view during the execution of a "severed" warrant, as evidenced by the First, Third, Fifth and Ninth Circuit opinions cited in *Apker*:

> "The approach of severing the general parts of a warrant, rather than considering the entire warrant invalid, has been embraced by four circuits, although in a more narrow version than that suggested by the dissent. *United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States v. Christine*, 687 F.2d 749 (3rd Cir. 1982); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1982). Although these courts accepted the severance approach in principle, no court has permitted the admission of items found in plain view while

executing the specific parts of the warrant. We would have to adopt an expansive, plain view severance approach to allow the guns to be admitted in this case. In *Riggs* and *Cook*, the courts were addressing the admissibility of items which were specifically described in the warrant. In *Christine*, a concurring judge would have adopted the plain view severance approach, but the majority did not adopt that rule. In *Cardwell*, the severance approach was embraced only in dicta; the court did not discuss a plain view extension." 705 F.2d at 307.

Application of the plain view exception in severance cases serves to undermine the very rationale of the practice of severance. In the instant case, the warrant, as severed, allowed executing officers to search for and seize particular items that were or could have been evidence of mail fraud. Although no evidence of mail fraud was uncovered, evidence allegedly seized "in plain view" was admitted against Jacob in a subsequent federal criminal proceeding, the subject of this petition. The danger of admitting evidence seized in plain view in a case such as this one is highlighted by the fact that among those present to search Jacob's office, was a special agent of the Internal Revenue Service. It is not difficult to imagine that the special agent's role in executing the warrant was to search for evidence of violation of federal tax law, an area not specified by the language of the warrant, but the area of federal criminal law under which Jacob was later charged and convicted. It is beyond the realm of credibility to suggest that the agents were searching for evidence of mail fraud alone. By holding the evidence seized allegedly in plain view to be admissible under these circumstances, the courts below have, for all practical purposes, revived the general language of the original warrant.

Jacob has been in personal contact with the Attorneys for *Apker* and *Fitzgerald* and as of March, 1984, Certiorari

has been denied in *Apker* and is pending in *Fitzgerald*, with Attorney John R. Wylde of Minneapolis just receiving an extension in *Fitzgerald* to file Petitioner's Reply Brief, the Petition for a Writ of Certiorari (No. 83-1285), having been filed on February 3, 1984.

It should be noted in *Apker* and *Fitzgerald* that there were allegations of Defendants being members or associates of the Hells Angels of Omaha and that, as such, they were involved in a conspiracy to distribute Methamphetamine and to gain a monopoly on the Methamphetamine traffic in Omaha, using threats, beating, torture, and murder against their competitors. Defendants were subsequently convicted of firearm possession under a plain view theory.

In *Fitzgerald*, the Government in its Brief for the United States in Opposition states:

> "Here the Federal and State Officers were told prior to the searches that petitioners had felonly convictions and therefore could not lawfully possess firearms (Pet. App. A7). Moreover, there is no suggestion that the agents had probable cause to believe they would find drugs or firearms while executing the arrest warrants."(Opp. Br., p. 16).

This is strikingly different from the *Jacob* case where there were no allegations of any on-going criminal activity. Indeed there was nothing apparently incriminating about the checks seized from Jacob as the Government had to bring witnesses to a Grand Jury after the raid to work up a nebulous tax case against Jacob where there was no tax deficiency against Jacob for 1975 or any other tax year.

On April 26, 1979, Felix S. Jacob was a practicing attorney in Baltimore, Maryland, who had been a member of the Maryland Bar since his graduation from Harvard Law School in 1955, was licensed to practice before the

Court of Appeals of Maryland and the Supreme Court of the United States, and had a good rating from Martindale Hubble and had never had any charge more serious than a speeding ticket. He is still a practicing attorney in Maryland since the Maryland Court of Appeals, in a full hearing with all members present, refused to suspend Jacob pending this appeal. Jacob submitted affidavits from many of his clients attesting to his good name in the community and requesting the Maryland Court of Appeals to allow him to continue practicing pending the final outcome of this case. On the evening of April 26, 1979, his office was subject to a raid by seven Government Agents, with a gun, including a special agent of the Internal Revenue Service, for over seven hours, based on a warrant that mentioned dealings with Dr. Gluck and payoffs of three insurance adjusters for mail fraud in violation of 18 U.S.C. § 1341. The facts were that Jacob had only had minimum contacts with Dr. Gluck and terminated the relationship in early 1973, over 6 years before the raid, there being a five year statute of limitations for mail fraud. In fact, Jacob had never even seen Dr. Gluck and had instructed everyone in his law offices to break off any contacts with Dr. Gluck in early 1973.

There was a complete misunderstanding regarding the three insurance adjusters, and not one penny was ever paid off to them. Not one of them testified before the Grand Jury involving Jacob, and one of them from the Nationwide Insurance Company signed an Affidavit in the Federal file denying payoffs from Jacob. Please note the footnote in the *Jacob* case on the Government's Brief:

> "The names of the adjusters were ordered excised from the public record by the District Court (Pet. App. A N.1)." (Opp. Br., p. 3).

This was done on motion by the Government after the November, 1980, hearing before Judge Miller in the United States District Court for Maryland to protect the

names of the innocent adjusters. Obviously, the Government was conceding that there was no probable cause against Jacob in the first place. In addition, the Assistant U.S. Attorney signed an affidavit that he was contemplating re-employment with the same law firm that he was with after graduation from Law School in 1973, said firm representing Nationwide and Maryland Casualty, two of the three companies named in the warrant.

Therefore, it appears that recent decision of the Fourth Circuit in the *Jacob* case is still in direct contrast to the position taken by the First, Third, Fifth and Ninth Circuits as cited in the *Apker* case.

III.

THE RECENT *APKER* AND *FITZGERALD* DECISIONS IN THE EIGHTH CIRCUIT PROPERLY OPEN UP A GOOD FAITH TEST WHICH SHOULD BE APPLIED IN THE *JACOB* CASE.

The *Fitzgerald* case on page seven of the slip opinion stated:

> "Because the record reflects neither pretext, bad faith, nor lack of inadvertence on the officers' part, the District Court properly admitted the shotgun into evidence."

This makes good sense. Petitioner takes the position that this Honorable Court should take the *Jacob* case to help clarify a good faith exception in Fourth Amendment cases, thus avoiding a questionable and nebulous finding of plain view where none existed in the first place. In addition, Petitioner maintains that plain view was waived at the first suppression hearing in 1980 when Judge Miller conducted a full hearing on the warrant and the search and asked the Assistant U.S. Attorney whether he was claiming plain view and he said he was not. A lawyer has a right to bind his client and the waiver by the First Assistant U.S. Attorney should have been binding on his client, the U.S. Government. Petitioner also maintains

that it was improper for the Fourth Circuit to order a new hearing on the search, when Judge Miller has already had a full hearing on the Search in November of 1980 and witnesses had testified. The Government's agreement with Jacob was that the only evidence that could be presented against him would be from the search, and if the evidence from the warrant and search turned out to be invalid, then Jacob would be not guilty. Jacob preserves this claim of double jeopardy when he filed a Writ of Certiorari in 1981. Solicitor General Rex E. Lee in January of 1982 stated that whatever the merits of Petitioner's contentions they were not presently ripe for review by this Court and that if Petitioner was convicted, he would then be able to present these claims to this Court, together with any other claims he may have, in a Petitioner for Writ of Certiorari, seeking review of a final judgment against him. The United States Court of Appeals for the Fourth Circuit affirmed Jacob's conviction, becoming the only Circuit in the country to allow the plain view exception in a severance case, without going on the determined good faith. It is Petitioner's contention the issues are ripe for review.

It is Jacob's understanding that this Honorable Court has heard a good faith case in *Massachusetts v. Sheppard,* No. 82-963.

Jacob asks this court to accept the *Jacob* case, apply a good faith exception in severance cases and Jacob maintains there was no good faith for the following reasons:

> 1. The presence of a Special Agent of the IRS on the evening of the raid. See App. 11-131 of the Special Agent Handbook which states on 313(1):
>
> "The purpose of a special agent's investigation is to obtain facts and evidence. His/her primary aim is to determine whether the person under investi-

gation has committed a criminal violation." Supp. App. 1.

2. The sworn statement of no wrong-doing of Jacob by the adjuster from Nationwide Insurance Company.

3. The Government's Motion to protect names of innocent adjusters.

4. Assistant U.S. Attorney's affidavit of prospective re-employment with law firm representing two of the three insurance companies named in the warrant. It is an undisputed fact that there was no wrong-doing with any insurance company.

Apker and *Fitzgerald* have opened the door to a good faith exception and this should be followed in the *Jacob* case.

IV.

JACOB WAS DENIED FUNDAMENTAL DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY NOT BEING ASKED WHETHER HE WANTED A JURY TRIAL FOR THE AMENDED CHARGES IN VIOLATION OF THE GOVERNMENT'S WRITTEN AGREEMENT WITH JACOB.

The Government, states:

> "Petitioner contends in conclusory fashion (Pet. 10) that he was denied due process because of the District Court's failure to permit a new plea to *allegedly* (emphasis added) amended charge." (Opp. Br., p. 8)."

This is misleading as the Government's footnote on page eight clearly shows that the Court allowed the Government to make the amendments after the Government had presented its entire case and a motion was made by Petitioner for a judgment of acquittal. Either the acquittal should have been granted or Jacob should have been asked how he pleaded to the amended charge or whether he wanted to waive a jury trial to the amended charge.

CONCLUSION

The Government had no probable cause to start with, subjected Jacob's office to a Kremlin-type raid by seven agents armed with a gun looking for any "evidence in violation of Federal Criminal Law," used a special agent of the IRS, found nothing in plain view to start with, waived any plain view that might have been contended, improperly held a second trial after a full first trial had been heard and denied Jacob a right to a jury trial after denial of a motion of acquittal after the Government had rested its case.

The Government does not contend that Jacob owed one penny of tax for 1975 or any other year but has gone to the incredible expenditure of time and money to put Jacob through the ordeal of four federal trials. A conviction would likely lead to Jacob's suspension or disbarment from the practice of law. Jacob is innocent.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Supplemental Appendix

App II-131

SPECIAL AGENTS HANDBOOK

General Investigative Procedure

313 *(5-9-80)* **9781**

Planning (Generally)

(1) The purpose of a special agent's investigation is to obtain facts and evidence. His/her primary aim is to determine whether the person under investigation has committed a criminal violation, and, if the facts disclose violations subject to criminal or civil penalties within the jurisdiction of the Criminal Investigation Division, to obtain whatever evidence is required to sustain criminal proceedings or the assertion of civil penalties.

(2) The special agent should first determine what he/she is attempting to prove. This involves an evaluation and analysis of the allegation to ascertain whether the available facts indicate a violation within Criminal Investigation Division jurisdiction and what evidence must be obtained to establish the elements of the crime. A work chart or other plan of procedure may then be developed. This essentially involves a determination of listing of information and evidence required and the probable source thereof. Planning for fraud investigations is discussed in 3(10)8. See also IRM 9381 and 9382.

(3) All criminal investigations should be commenced and concluded as expeditiously as possible. They should be conducted impartially and thoroughly to obtain all pertinent information and evidence. Duplication in investigations, unnecessary inconveniences to the public and unnecessary embarrassment to the taxpayer should be avoided. Appropriate courtesy should be shown when soliciting information.